IMI South, LLC, d/b/a Irving Materials *and* General Drivers, Warehousemen and Helpers, Local Union No. 89 affiliated with the International Brotherhood of Teamsters. Case 09–CA–073769 and 09–CA–080462

August 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On December 18, 2012, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring a portion of bargaining unit work from union-represented employees at the Respondent's facility in Louisville, Kentucky, to unrepresented employees at its facility in New Albany, Indiana. The judge found no violation. For the reasons set forth below, we reverse the judge and find that the Respondent's unilateral transfer of bargaining unit work did violate Section 8(a)(5) and (1). We also reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate any of the mechanics who engaged in an economic strike.

I. FACTS

The Respondent produces and distributes ready-mix concrete from a number of facilities, including one in Louisville and another in New Albany, about 15 miles away. Teamsters Local 89 has represented a unit of employees, including truck drivers and truck mechanics, at the Louisville facility since at least 1993. By the express terms of the parties' collective-bargaining agreement, the Louisville mechanics maintain and repair the Respondent's trucks operating in Kentucky. Since at least 1993, those mechanics have also maintained and repaired trucks operating in southern Indiana, although the parties' collective-bargaining agreement did not expressly cover that work.[1]

In May 2011, the Respondent began preparing to open a maintenance shop in New Albany, Indiana, in anticipation of the expected closure of one of three Ohio River bridges connecting Louisville and southern Indiana.[2] The Respondent initially planned to open this shop at the start of 2012. At no time did the Respondent inform the Union of its plans, let alone indicate whether the operation of this shop was intended to be a temporary or a permanent measure.

When the Sherman Minton Bridge unexpectedly closed on September 9, 2011, the Respondent decided to open the maintenance shop in New Albany as soon as possible, and the shop was operational by mid-October. But the Respondent still did not notify the Union of the existence of the shop.

Meanwhile, negotiations for a successor to the existing Louisville collective-bargaining agreement had begun on June 13, 2011.[3] One of the Union's initial proposals was to "Define area for the shop and Drivers." The Union orally explained that this proposal was an attempt to expressly incorporate the parties' past practice of the Louisville mechanics performing maintenance and repair work on trucks operated in southern Indiana. The Respondent did not then (or ever) inform the Union of its plan to operate the New Albany maintenance shop, but instead rejected the proposal, stating only that the company "maintained our rights to service [Southern Indiana] in the most flexible way that we need to." The proposal to modify the agreement's geographic scope was not discussed again at any bargaining sessions, which continued into 2012.

The Union commenced a strike at the Louisville facility on September 7, 2011. By mid-October, the Respondent had hired two new mechanics at the New Albany shop to perform maintenance and repair work on the Respondent's trucks in southern Indiana, work that Louisville mechanics had historically performed prior to the strike. The Respondent also hired two mechanics in Louisville during the strike to continue servicing trucks operating in Kentucky.

At some point after January 1, 2012, but prior to the conclusion of negotiations, the Union's lead negotiator, Jeffrey Cooper, became aware of the New Albany maintenance operation from sources other than the Respondent. Cooper contacted the Union's New Albany steward and

[1] The territory covered was "Kentucky territory defined as Louisville and Middletown. . . ."

[2] The three bridges are the Kennedy Bridge, the Sherman Minton Bridge, and the Second Street Bridge. Only the Kennedy Bridge and the Sherman Minton Bridge are open to commercial traffic. As of May 2011, the State of Kentucky had announced plans to close the Kennedy Bridge for repair work, but the State had not announced when the anticipated closure would take place.

[3] By its terms, the most recent collective-bargaining agreement was effective from July 1, 2008 to June 30, 2011.

asked for the names of the New Albany mechanics.[4] Cooper never made any additional inquiries regarding the New Albany shop during the strike or in subsequent negotiations.

On February 16, 2012, the parties entered into a new collective-bargaining agreement (2012 agreement). The agreement's geographic scope provision was identical to the corresponding provision in the prior agreement. The agreement also contained a "zipper clause," set forth below, identical to the one in the prior agreement:

> ARTICLE XV
>
> EXTENT AND NATURE OF AGREEMENT
>
> Section 1: This Agreement expresses the complete understanding of the parties on subjects of wages, hours of employment and working conditions. During the term of this Agreement neither party hereto will make any demands upon the other with respect to any and all matters not covered herein.
>
> Section 2: This Agreement embraces in their entirety all the terms and conditions imposed on and the benefits granted to the parties and shall be strictly construed. The rights, duties, and privileges are strictly limited to the terms stated.
>
> Section 3: [omitted due to irrelevance]
>
> Section 4: By the execution of this Agreement, the parties hereto have annulled any prior Agreement or understanding, whether written, verbal or implied, which may have existed between Irving Materials, Inc. and Truck Drivers Local Union No. 89, or any member of either organization.

The Union made an unconditional offer to return to work on April 29, 2012. The Respondent did not reinstate any of the six mechanics who had been working at the Louisville facility prior to the strike. The Respondent, however, retained the two mechanics hired in Louisville during the strike as well as the two mechanics hired in New Albany. After the strike, the Respondent continued to perform maintenance and repair work for southern Indiana at its New Albany facility.

II. JUDGE'S DECISION

The judge found that the Respondent had a longstanding practice of assigning maintenance work in southern Indiana to bargaining unit mechanics at its Louisville facility, and that it was obligated to bargain with the Union over any change to that practice. The judge further found that the Respondent never notified the Union that it was planning to transfer, or had transferred, bargaining unit work to the New Albany facility. Nevertheless, the judge concluded that the Respondent's actions did not violate Section 8(a)(5) and (1) of the Act because the Union had actual notice of the transfer and waived its right to bargain through a lack of diligence. The judge based his waiver finding on four factors: (1) the Union's acquiescence in the Respondent's rejection of its proposal to incorporate the parties' established past practice of performing southern Indiana repair work in Louisville into their collective-bargaining agreement; (2) the Union's inaction at the bargaining table when it learned that the Respondent had transferred unit work to New Albany; (3) the geographical scope provision in the 2012 agreement; and (4) the zipper clause in the 2012 agreement, which the judge read to negate any past practice not memorialized in the new agreement. The judge also rejected the General Counsel's claim that the transfer of work was a fait accompli by the time the Union learned of it. The judge reasoned that because bargaining was ongoing, the Union had an opportunity to inquire about the New Albany shop and demand bargaining before the change affected unit employees.

III. ANALYSIS

A. Transfer of bargaining-unit work

We agree with the judge, for the reasons he stated, that the Respondent's longstanding assignment of southern Indiana maintenance work to bargaining unit mechanics at the Louisville facility had become an implied term and condition of employment, and that the Respondent therefore had an obligation to give the Union notice and an opportunity to bargain over changes to that practice. See *Lafayette Grinding Corp.*, 337 NLRB 832, 832 (2002).[5] Contrary to the judge, however, we find that the Respondent has not shown that the Union waived its right to bargain over the change at issue here. As a result, we find that the Respondent's unilateral transfer of work violated Section 8(a)(5) and (1) of the Act.

The Board's waiver principles are well established. Waiver is not lightly inferred and must be "clear and unmistakable." See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998), enfd. 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061 (1999). Thus, the party asserting waiver must establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular

[4] Local 89 represented some of the employees at the New Albany facility, but not the mechanics.

[5] The Respondent argues that the facts show that it has no obligation to assign southern Indiana work to the Louisville mechanics under the 2012 agreement. The Respondent does not, however, dispute that it had a past practice of assigning this work to Louisville bargaining-unit mechanics.

employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).[6] Such a showing may be based on an express provision in the contract, the conduct of the parties (including past practice, bargaining history, and action or inaction), or a combination of the two. See, e.g., *American Diamond Tool*, 306 NLRB 570, 570 (1992); Chesapeake & Potomac Telephone Co. v. NLRB, 687 F.2d 633, 636 (2d. Cir. 1982), enfg. 259 NLRB 225 (1981).

1. Contractual language does not establish waiver

Contrary to the judge, we find that the Respondent has not established waiver based on any contractual language. The judge relied on two provisions in the 2012 agreement to find that the Union had agreed to waive its right to bargain over the Respondent's transfer of bargaining-unit maintenance and repair work from Louisville to New Albany: the zipper clause, quoted above, and the geographic scope provision stating that the territory covered by the agreement was "Kentucky territory defined as Louisville and Middletown." Both of these clauses were unchanged carryovers from the predecessor agreement. Neither, however, establishes a "clear and unmistakable" waiver.

The judge's reliance on the zipper clause fails for several reasons. The zipper clause does not mention, or in any way refer to, the transfer of unit work. It is, in fact, simply a generally worded zipper clause, which the Board has squarely held is not sufficient to demonstrate that a union has waived its statutory right to bargain over a specific subject. See *Ohio Power Co.*, 317 NLRB 135, 136 (1995), citing *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989). Accord *Michigan Bell Telephone Co.*, 306 NLRB 281, 282 (1992).

Moreover, the judge's view conflicts with the settled principle that the "normal function" of zipper clauses is "to maintain the status quo, not to facilitate unilateral changes." *Murphy Oil USA*, 286 NLRB 1039, 1039 (1987). The status quo here was that the Respondent had, since at least 1993, continually assigned southern Indiana maintenance and repair work to Louisville mechanics. Significantly, that practice had continued uninterrupted under the 2008–2011 agreement which contained the identical zipper clause. Those circumstances provide further evidence that the zipper clause in the 2012 agreement was not intended to change the existing practice. See *Ohio Power*, supra, 317 NLRB at 136; *Aeronca, Inc.*, 253 NLRB 261, 265 (1980), enf. denied 650 F.2d 501 (4th Cir. 1981).

To be sure, there may be circumstances in which a zipper clause does establish a waiver, such as when the scope of the clause is significantly expanded or is discussed during bargaining. See, e.g., *TCI of New York*, supra, 301 NLRB at 824–825 (finding zipper clause was clear and unmistakable waiver where the employer had sought, and obtained, broader language than was in the prior zipper clause); *Columbus & Southern Ohio Electric Co.*, 270 NLRB 686 (1984), enfd. sub nom. *Electrical Workers Local 1466 v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986) (finding waiver of bargaining over elimination of a holiday bonus where extensive bargaining over zipper clause demonstrated the union's knowledge of its consequences). But there are no such circumstances in the present case. As discussed, the zipper clause in the 2012 agreement was unchanged from prior agreements; there is no evidence that the parties ever proposed, let alone bargained over, any changes to the specific language in the zipper clause. Nor is there any evidence that the parties ever discussed the zipper clause as it related to past practices, either in general terms or in relation to the specific practice of assigning southern Indiana maintenance and repair work to the Louisville shop.

For those reasons, we find that the zipper clause in the 2012 agreement does not support the Respondent's waiver defense. Compare *Sykel Enterprises*, 324 NLRB 1123, 1123 (1997) (no waiver where respondent did not give clear notice of intended change during negotiations); *Ohio Power*, supra, 317 NLRB at 136 (finding that generally worded zipper clause was not clear and unmistakable waiver of union's right to bargain over a longstanding practice that was not mentioned in the parties' contract, where the parties had discussed the practice during negotiations for a successor collective-bargaining agreement but the employer never advised the union that it intended to terminate the practice).

We reach the same conclusion with respect to the unchanged geographical scope clause in the 2012 agreement. As noted, that provision stated that "[t]he territory covered by this Agreement shall be the Kentucky territory defined as Louisville and Middleton." Although referring to "the Kentucky territory," it is undisputed that the parties had interpreted this provision to cover southern Indiana maintenance and repair work performed by the Louisville shop. The Respondent did not make any proposal to alter that understanding in the negotiations leading to the 2012 agreement.

As described, in a single exchange the Union proposed to expressly incorporate the parties' understanding in the

[6] The party asserting waiver bears the burden of proof. See *TCI of New York*, 301 NLRB 822, 824 (1991).

2012 agreement, and the Respondent rejected that proposal. But that simply left the status quo in place. Neither party ever indicated that it was abandoning that practice, nor did either party give any indication that the assignment of southern Indiana work was a subject left to the Respondent's sole discretion. See *Ohio Power*, supra, 317 NLRB at 136. We thus disagree with the judge's conclusion that the geographic scope clause supports a finding of waiver here.

2. Extrinsic evidence does not establish waiver

Likewise, we do not find that extrinsic evidence, including the relevant bargaining history, establishes a clear and unmistakable waiver of the Union's bargaining rights over the relocation of work. With respect to the parties' bargaining, it is the Respondent's burden to establish that the parties fully discussed and consciously explored the subject and that the Union "consciously yielded" its right to bargain over the issue. See *Georgia Power*, supra, 325 NLRB at 420–421; see also *Provena St. Joseph*, supra, 350 NLRB at 811. The record does not support such a finding in this case.

In negotiating the 2012 agreement, the parties never once discussed the Respondent's authority to relocate bargaining-unit work. The only exchange even remotely related to this subject occurred when, as described, the Union proposed on the first day of negotiations to modify the geographic scope provision to expressly include the southern Indiana maintenance and repair work that Louisville mechanics were already performing. Although the Respondent rejected the proposal, it did not indicate that it objected to the continuation of the past practice, even though, at this point, the Respondent had already made its (undisclosed) decision to open a new maintenance shop in New Albany. The Union's proposal was never discussed again.

Those facts simply do not establish that the parties "unequivocally and specifically express[ed] their mutual intention" to permit the Respondent to unilaterally transfer bargaining-unit work from Louisville to New Albany. *Provena St. Joseph*, supra, 350 NLRB at 811. The Union's acceptance of the Respondent's refusal to change the contract language did not express its willingness to jettison past practice but instead shows only that the parties agreed to maintain the status quo. See id.; *Ohio Power Co.*, supra, 317 NLRB at 137.[7] Maintaining the status quo meant continuing to assign southern Indiana maintenance and repair work to Louisville mechanics, at least until the Respondent gave notice that it wished to do otherwise and gave the Union an opportunity to bargain before effectuating the change.[8]

Nor are we persuaded by the fact that the Union independently learned, at some point after January 1, 2012, that some maintenance and repair work was being performed at New Albany. Initially, we emphasize again that the Respondent had an affirmative duty to give notice of its decision to discontinue the parties' established practice. This was no minor procedural matter. It was a necessary step in the Respondent's statutory duty to bargain with the Union "in a meaningful manner and at a meaningful time." See, e.g., *Metropolitan Teletronics*, 279 NLRB 957, 959 (1986), enfd. 819 F.2d 1130 (2d Cir. 1987), quoting *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). See also *Defiance Hospital*, 330 NLRB 492, 492 (2000), citing *Ciba-Geigy Pharmaceuticals Division v. NLRB*, 722 F.2d 1120, 1126 (3d Cir. 1983). The Respondent's persistent failure to satisfy that obligation not only ignored the representative status of the Union, see *Defiance*, supra, at 493, but, as we now show, significantly diminishes the weight to be given the Union's knowledge that some unit work was being performed in New Albany.

The Respondent began preparing to open the New Albany shop in May 2011, before the parties had even begun

[7] In context, the Respondent's statement that it wanted to "maintain[] our rights to service [Southern Indiana] in the most flexible way that we need to" would not have put the Union on notice that the Respondent had decided to abandon the parties' established practice or was seeking the discretion to do so. From the Union's perspective, incorporating the past practice would have enhanced its position by precluding the Respondent from changing the practice without the Union's consent for the term of the contract. As things stood, the Respondent had the right to impose a new practice after bargaining to a good-faith impasse, even over the Union's objections. See *Provena St. Joseph*, supra, 350 NLRB at 811 fn. 16. In that context, we find that the Union reasonably would have concluded that the Respondent's statement was merely a reference to that right.

[8] This case is distinguishable from *Radioear Corp.*, 214 NLRB 362 (1974), relied on by the judge, where the Board found that a union had waived its right to bargain over the elimination of an extracontractual benefit. In *Radioear*, there was no history of the benefit having been granted notwithstanding apparently conflicting language in the zipper clause. Further, the Board found that the parties had fully explored the change, and the union had "conscious[ly], knowing[ly]" waived its statutory rights. Id. at 364. The employer also had not engaged in any "concealment" of existing benefits. Id.

The complaint alleges that the violation occurred when the Respondent actually transferred bargaining unit work (about September 26, 2011, while employees were on strike). We note, however, that the Respondent unilaterally made the decision to open a shop in Southern Indiana in May 2011. Even if the Respondent had informed the Union of its decision to relocate work, its presentation of the proposed change as a fait accompli would have relieved the Union of its obligation to request bargaining. See *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001) ("[A] finding of fait accompli will prevent a finding that failure to request bargaining is a waiver."); *Intersystems Design Corp.*, 278 NLRB 759, 759 (1986) ("Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated."), citing *Gulf States Mfg. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

negotiations for a successor collective-bargaining agreement. It *never* informed the Union of its plans or that it opened the shop. The Union only learned of the shop's existence by chance. When the Union first gained that knowledge, the strike was underway. Thus, the transfer had no immediate impact on the bargaining unit. And because the Respondent was continuing operations during the strike, the Union reasonably could have thought that the New Albany shop was a temporary, stopgap measure to weather the strike, over which the Respondent had no obligation to bargain. See, e.g., *Titan Tire Corp.,* 333 NLRB 1156, 1156 fn. 7 (2001) (no duty to bargain over temporary subcontracting to continue operations during strike). Further, the record establishes that some bargaining-unit work was still being performed at the Louisville facility at all relevant times, including during the strike, raising the question whether the Respondent had made a permanent change or was simply improvising a solution to get through the work stoppage. Last, although not essential to our analysis, we observe that the Respondent, which was in possession of all the material facts at all material times, reasonably should have known that the Union could misapprehend the meaning of its actions, yet the Respondent remained silent throughout.[9] In those circumstances, we find that the record does not warrant a finding that the Union "consciously yielded" its right to bargain over the Respondent's decision to *permanently* transfer unit work.[10]

Finally, even if the Union could be charged with knowledge that the Respondent had made a permanent change, the Respondent had unlawfully implemented the transfer by the time the Union learned of it, making the change a fait accompli. In these circumstances, it was reasonable for the Union to believe that any attempts to bargain would be futile, and its failure to request bargaining does not indicate its consent to the change. See, e.g., *Bohemian Club*, 351 NLRB 1065, 1067 (2007) (finding request for bargaining would have been futile where union learned of unilateral change one week after change was implemented); *Tri-Tech Services*, 340 NLRB 894, 903 (2003) ("A Union does not waive its right to bargain over unilateral changes by failing to engage in the futile act of trying to turn back the clock and bargain over an action the employer has already taken."), citing *Gulf States Mfg. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

In sum, the Respondent has failed to present any compelling reasons for failing to fulfill its statutory duty to give the Union notice of, and the opportunity to bargain over, changes to existing terms and conditions of employment. The Respondent also has not demonstrated that the Union waived its right to bargain over the relocation or transfer of work, either through the provisions of the 2012 agreement, the conduct of the parties, or any combination of the two. We therefore reverse the judge and find that the Respondent violated Section 8(a)(5) and (1) of the Act.

Our dissenting colleague nonetheless argues that the Respondent had no obligation to bargain over its decision to open a maintenance shop in New Albany because the decision was not a mandatory subject of bargaining. The Respondent has never made this argument, either to the judge or in exceptions,[11] and we will not consider it now. See, e.g., *Enterprise Leasing Co. of Florida v. NLRB*,—F.3d.—(D.C. Cir. Aug. 5, 2016); *Trailmobile Trailer, LLC*, 343 NLRB 95, 96 (2004); *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000).

But even accepting our dissenting colleague's view that *Dubuque Packing Co.* applies,[12] we do not agree with him

[9] The Respondent's failure to communicate the change to the Union was not the result of an inadvertent oversight or a belief that the Union knew about, and did not object to, the change. Compare *American Diamond Tool*, supra, 306 NLRB 570.

[10] In reaching this conclusion, we acknowledge that the Union might have achieved more in collective bargaining had it confronted the Respondent with its conduct, but that is not the issue here. The question is whether the Respondent established that the Union, by not acting, clearly and unmistakably waived its statutory rights. On that question, we find the Respondent's case lacking.

[11] The Respondent's consistent position has been that it has no obligation to assign Southern Indiana work to Louisville mechanics, that even if such a practice existed the Respondent and the Union *did* bargain over moving the work and, finally, that the Union waived any right to bargain over the opening of the New Albany maintenance shop.

[12] 303 NLRB 386 (1991), enfd. 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994). *Dubuque Packing* set forth the test for determining whether an employer's decision to relocate a portion of its operations is a mandatory subject of bargaining. The Board held that:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to a new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor costs concessions that could have changed the employer's decision to relocate.

Id. at 391.

Our dissenting colleague does not dispute that the General Counsel established a prima facie case that the Respondent's decision to open the New Albany shop was a mandatory subject of bargaining.

that the Respondent has shown that its decision to open a maintenance shop in New Albany and relocate bargaining unit work there was "completely unrelated" to labor costs and that the Union could not have offered concessions that could have changed the Respondent's decision. It is the Respondent's burden to establish this defense. Id. at 391. While the Respondent's witnesses testified that they were concerned about anticipated future bridge closures[13] and associated congestion in crossing the river,[14] this cursory testimony is insufficient to show that direct or indirect labor costs, such as, for example, increased overtime costs resulting from traffic delays, did not factor in the Respondent's decision. Moreover, the Respondent never asserted that the Union could not have offered concessions that could have changed the Respondent's decision. This failure of proof is unsurprising, given that the Respondent never raised or litigated this defense.

Finally, although the dissent would find that the Respondent had an obligation to bargain over the effects of its decision, he would find that the Union waived this right by failing to request bargaining after learning of the opening of the New Albany shop. For the reasons fully discussed above, we reject that defense.

B. Failure to recall striking employees

As mentioned, the Union made an unconditional offer to return to work on behalf of striking employees on April 29, 2012. Despite this offer, the Respondent refused to reinstate any of the striking mechanics formerly employed at its Louisville facility. Contrary to the judge and our dissenting colleague, we find this failure unlawful.[15]

It is well settled that an employer violates Section 8(a)(3) and (1) of the Act if it fails to reinstate strikers on their unconditional offers to return to work, unless the employer can establish a "legitimate and substantial business justification" for failing to do so. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). The employer bears the burden of proving such a justification. See id.

The Respondent claims that it permanently replaced the strikers in order to continue operations during the strike which, if true, would constitute a legitimate and substantial business justification. See, e.g., *NLRB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345–346 (1938). The employer, however, bears the burden of proving the permanent status of the replacements. See, e.g., *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002), enfd. 63 Fed. App'x 520 (D.C. Cir. 2003). To meet that burden, the employer must show that there was a mutual understanding between the employer and the replacements that the nature of their employment was permanent. Id. The Respondent's own intent to employ the replacements permanently is insufficient. See *Hansen Bros. Enterprises*, 279 NLRB 741, 741–742 (1986), enfd. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987).

Here, the Respondent made no showing that it shared any "mutual understanding" with any replacement employees about the nature of their employment; its bare assertion that strikers were permanently replaced does not suffice.[16] As the Respondent has asserted no alternative legitimate and substantial business justification,[17] we find that the Respondent's refusal to reinstate the strikers upon their unconditional offer to return to work violated the Act. Compare *Ford Bros.*, 294 NLRB 107, 132–133 (1989) (affirming judge's finding that respondent failed to show legitimate and substantial business justification where it offered no evidence to support its president's uncorroborated testimony of lost business).[18]

CONCLUSIONS OF LAW

1. IMI South, LLC, d/b/a Irving Materials, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[13] We note that, at all material times, there was at least one bridge open and available to commercial traffic.

[14] Our dissenting colleague asserts that the Respondent decided to open a maintenance shop in New Albany, Indiana for "logistical reasons" related to the unexpected shutdown of the Sherman Minton Bridge in September 2011, as well as the expected future closure of the Kennedy Bridge. This assertion, however, is not supported by the record. The Respondent made the decision to open a new maintenance shop and began preparations in May 2011, four months before the closure of the Sherman Minton Bridge. The closure of the Sherman Minton Bridge simply led the Respondent to open the new shop sooner than early 2012, as it originally planned.

[15] We reject the Respondent's argument that the Union and the General Counsel are attempting to "expand the scope of the charge" by requesting that we order the Respondent to reinstate mechanics who participated in the economic strike. This allegation has been a part of this case at all relevant times. The charge filed by the Union on May 4, 2012, alleged both that the Respondent had failed to bargain in good faith and that the Respondent had refused to immediately reinstate bargaining unit employees to their positions upon their unconditional offer to return to work. The complaint also included an allegation that the Respondent's refusal to reinstate two striking employees was a violation of Sec. 8(a)(3) and (1) of the Act, and the Respondent specifically replied to this allegation in its answer, admitting that it has refused to return strikers to work, but denying that its refusal was a violation of the Act.

[16] The Respondent claims that the parties acknowledged that the Respondent had hired permanent replacements at Louisville and at New Albany. We find no such acknowledgement in the record, however, and, as the complaint and exceptions show, it is clear that the General Counsel disagrees.

[17] Contrary to our dissenting colleague, we do not find the Respondent's bare assertion that it needed fewer mechanics because of a reduction in its fleet sufficient to establish a legitimate and substantial business justification for refusing to reinstate striking mechanics.

[18] We shall leave to compliance the determination of the precise number of strikers to be reinstated.

The judge remanded Case 09-CA-073769 to the Regional Director to process an informal settlement that the judge approved on the record during the hearing.

2. General Drivers, Warehousemen and Helpers, Local Union No. 89 affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been, and is, the exclusive representative of the employees in the following appropriate collective-bargaining unit within the meaning of Section 9(a) of the Act:

> All truck and garage operation employees including, all ready mix truck drivers, ready mix batch and yard laborers and ready mix truck mechanics employed by [Respondent] at its facilities in Louisville, Middletown, Shelbyville and Shepherdsville, Kentucky, excluding office clerical employees, superintendents, assistant superintendents, foremen, dispatchers, watchmen, and professional employees, guards, and supervisors as defined in the Act.

4. On April 29, 2012, the Union made an unconditional offer on behalf of unit employees to return to work from an economic strike which began on September 7, 2011.

5. By failing and refusing to immediately reinstate the employees described in paragraph 4 above, on their unconditional offer to return to work to their former positions, or substantially equivalent positions if those positions were no longer available for legitimate and substantial business reasons, the Respondent has violated Section 8(a)(3) and (1) of the Act.

6. By failing to notify the Union of its decision to transfer bargaining-unit work to its facility in New Albany, Indiana, and by failing to give the Union an opportunity to bargain over the decision and its effects, the Respondent has violated Section 8(a)(5) and (1) of the Act.

7. The unfair labor practices listed above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring unit work to New Albany, Indiana, we shall order the Respondent to rescind the unlawful unilateral transfer and restore the status quo ante by transferring the relocated work back to Louisville, Kentucky, and to provide the Union with notice and an opportunity to bargain regarding any future proposed changes and their effects. At the compliance stage of the proceedings, the Respondent may introduce evidence that was not available prior to the unfair labor practice hearing, if any, to demonstrate that restoring the business transferred to New Albany would be unduly burdensome. See *St. Vincent Medical Center*, 349 NLRB 365, 368 fn. 5 (2007); *Lear Siegler, Inc.*, 295 NLRB 857, 861–862 (1989).

Having found that the Respondent violated Section 8(a)(3) and (1) by failing to immediately reinstate economic strikers upon the Union's unconditional offer on their behalf to return to work, we shall order that they be reinstated to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges. We shall further order the Respondent to make them whole for any loss of earnings or other benefits suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with F.W. Woolworth Co., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, we shall order the Respondent to compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. See *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

In accordance with our recent decision in *King Soopers, Inc.,* 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra.[19]

Further, the Respondent shall be required to remove from its files all references to the refusal to reinstate striking mechanics. The Respondent shall notify employees in writing that this has been done and that the unlawful refusal to reinstate them will not be used against them in any way.

[19] For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 9–16, our dissenting colleague would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

ORDER

The National Labor Relations Board orders that the Respondent, IMI South, LLC, d/b/a Irving Materials, Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Transferring any bargaining-unit work from Louisville, Kentucky to New Albany, Indiana, without first notifying the Union and giving it an opportunity to bargain regarding the decision and its effects.

(b) Failing or refusing to reinstate striking employees to their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful unilateral transfer of unit work to the Respondent's facility in New Albany, Indiana and restore the status quo ante by restoring to the Respondent's Louisville facility all work previously performed by bargaining-unit employees before being transferred to New Albany.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All truck and garage operation employees including, all ready mix truck drivers, ready mix batch and yard laborers and ready mix truck mechanics employed by [Respondent] at its facilities in Louisville, Middletown, Shelbyville and Shepherdsville, Kentucky, excluding office clerical employees, superintendents, assistant superintendents, foremen, dispatchers, watchmen, and professional employees, guards, and supervisors as defined in the Act.

(c) Within 14 days from the date of this Order, offer employees who were refused reinstatement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

(d) Make employees who were refused reinstatement whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to reinstate and, within 3 days thereafter, notify employees in writing that this has been done and that the refusals to reinstate will not be used against them in any way.

(g) Within 14 days after service by the Region, post at its Louisville, Kentucky, facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 26, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

The National Labor Relations Act (NLRA or Act) requires bargaining over an employer's decision to change "wages, hours, and other terms and conditions of employment."[1] In a long line of cases, the Board and the courts, including the Supreme Court, have established three important principles that are relevant here regarding the nature and scope of the duty to bargain.

First, some decisions involving major business changes are closely related enough to wages and working conditions to require mandatory decision bargaining, but decision bargaining is not always required.[2] In *Fibreboard Paper Products Corp. v. NLRB*,[3] the Supreme Court held that a decision to engage in subcontracting was a mandatory subject of bargaining where the subcontracting consisted of replacing an employer's employees with those of a subcontractor "to do the same work under similar conditions of employment." However, the Supreme Court stated that its holding did not encompass "other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy."[4] This limitation on the *Fibreboard* decision was underscored in Justice Stewart's well-known concurring opinion,[5] which stated: "Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." Justice Stewart continued:

> If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.[6]

Second, even if decision bargaining is not required regarding a major business change, an employer may be required to provide notice and the opportunity for bargaining regarding the decision's *effects*. According to the Supreme Court, effects bargaining, if required, must be conducted "in a meaningful manner and at a meaningful time."[7]

Third, even when decision or effects bargaining is required, it is well established that a union waives its bargaining rights if it fails to request bargaining after it becomes aware of a particular change.[8] Thus, in *U.S. Lingerie Corp.*, 170 NLRB 750, 751–752 (1968), there was no

[1] Sec. 8(d) (defining the duty "to bargain collectively"); Sec. 8(a)(5) (making it an unfair labor practice for employers to refuse to bargain collectively with the representatives of its employees, subject to the provisions of Sec. 9(a)). See *NLRB v. Katz*, 369 U.S. 736, 748 (1962) (requiring bargaining before an employer decides to implement changes in mandatory bargaining subjects).

[2] When decision bargaining is required over a particular change, the Act normally requires that the employer provide the union notice and the opportunity for bargaining over the potential decision while it remains tentative, and the Board's remedy for violations typically includes requiring the employer to restore the status quo ante—i.e., to rescind the implemented decision and reinstate and make whole the affected employees. When decision bargaining is not required, the Board and the courts frequently require "effects" bargaining. That is, even if the employer is permitted to make a final decision without bargaining, it is typically required to provide the union notice and the opportunity for bargaining over the decision's effects before they have an impact on unit employees. See generally *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981) (describing the difference between bargaining over a decision and bargaining over its effects). When an employer commits an effects-bargaining violation, the remedy does not include a requirement to rescind the underlying decision or otherwise restore the status quo ante; rather, the employer is typically required to engage in effects bargaining and provide a limited backpay remedy (often called a "Transmarine" remedy). See *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

[3] 379 U.S. 203, 211 (1964).

[4] Id. at 215.

[5] Commentators have stated that Justice Stewart's concurrence in *Fibreboard* has "ultimately proved to be even more influential than the opinion of the Court." Robert A. Gorman & Matthew W. Finkin, LABOR LAW ANALYSIS AND ADVOCACY 794 (Juris 2013).

[6] *Fibreboard*, 379 U.S. at 217, 223 (Justice Stewart, concurring). See also *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 676 (finding that decision bargaining is not required over partial closing decisions, and observing that Congress, in adopting the NLRA, "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed"); *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), affd. sub nom. *UFCW Local No. 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993) (setting forth standards that govern whether decision bargaining is required over work-relocation decisions).

[7] *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 682.

[8] *AT&T Corp.*, 337 NLRB 689, 691–693 (2000); *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977); *The Emporium*, 221 NLRB 1211, 1214 (1975); *Medicenter, Mid-South Hospital*, 221 NLRB 670, 679 (1975); *Kentron of Hawaii Ltd.*, 214 NLRB 834, 835 (1974); *American Buslines, Inc.*, 164 NLRB 1055, 1055–1056 (1967). The requirement that a union must request bargaining to preserve its right to engage in bargaining is not satisfied merely by protesting a particular change or filing a refusal-to-bargain charge with the Board. See *Ohio Edison Co.*, 362 NLRB No. 88, slip op. at 3–6 (Member Miscimarra, dissenting in part) (citing cases).

unlawful failure to bargain over an employer's relocation because, according to the Board, "the Union had sufficient notice of Respondent's intended move to place upon it the burden of demanding bargaining if it wished to preserve its rights to bargain." Id. at 752.

In this case, the Respondent operates ready-mix concrete facilities in Louisville, Kentucky and New Albany, Indiana (among other locations), and its sole maintenance shop for trucks operating out of both facilities was located in Louisville. In September 2011, while the Respondent and the Union were engaged in collective bargaining and the unit employees were on strike, the State of Kentucky shut down the Sherman Minton Bridge, which was one of only two bridges over the Ohio River open to commercial traffic between Louisville and southern Indiana. Kentucky had previously announced plans to repair the Kennedy Bridge, the second bridge open to commercial traffic between Louisville and southern Indiana. For these logistical reasons, which were clearly unrelated to wages and other matters being negotiated between the Respondent and the Union, the Respondent opened a maintenance shop at its New Albany facility so that trucks operating in Indiana could be serviced without requiring them to travel over the heavily congested Kennedy Bridge, which was itself slated for repair.

On these facts, I believe my colleagues misapply each of the principles described above in finding that the Respondent had, and breached, a duty to bargain.

Regarding the first principle, the Respondent had no obligation to bargain over the decision to open the maintenance shop in New Albany. Even if this were considered a partial relocation of bargaining-unit work from the Louisville truck maintenance facility, wages were not a factor in this decision, and controlling Board precedent establishes that decision bargaining is not required under these circumstances. *Dubuque Packing*, supra.

Regarding the second and third principles, I agree that the Respondent had a potential obligation to bargain over the *effects* that the opening of the New Albany maintenance shop might have on unit employees. However, any failure by Respondent to satisfy its effects-bargaining obligation would not justify the remedy ordered by my colleagues, who require the Respondent to rescind the Louisville-to-New Albany work relocation and provide backpay and reinstatement to the affected employees.[9] More importantly, I agree with the judge's finding that the Union waived its right to bargain because it never requested bargaining over the New Albany service center even though it knew about the partial relocation of unit work *for months*. Indeed, not only did the Union have the requisite knowledge and the opportunity to request bargaining, it was *engaged* in bargaining with Respondent over an array of other issues, yet it never requested bargaining over the opening the New Albany shop. Accordingly, I respectfully dissent from my colleagues' decision.

1. *The relocation of mechanic work from Louisville to New Albany was not a mandatory subject of decision bargaining.* As stated above, employers may not unilaterally decide to change wages, hours, or other terms and conditions of employment without providing notice and the opportunity to request decision bargaining regarding the proposed change. See *NLRB v. Katz*, supra, 369 U.S. at 743. However, a decision to implement a major business change, such as a closing, a shutdown, subcontracting, or a work relocation, is not necessarily a mandatory subject of bargaining. See, e.g., *Fibreboard*, supra; *First National Maintenance Corp.*, supra.

Regarding work relocations, the existence or nonexistence of a decision-bargaining obligation turns on application of the well-established standards set forth in *Dubuque Packing*, supra, where the Board held as follows:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to a new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor costs concessions that could have changed the employer's decision to relocate.[10]

[9] Even if the Respondent failed to satisfy its effects-bargaining obligation, the appropriate remedy would include an order to engage in effects bargaining and a limited *Transmarine* backpay remedy. See *Transmarine Navigation Corp.*, supra.

[10] *Dubuque Packing*, supra, 303 NLRB at 391. I am not an enthusiastic supporter of the multiple-step, burden-shifting standard articulated in *Dubuque Packing*, which in my view resembles the type of "presumption" analysis the Supreme Court rejected in *First National Maintenance* as being "ill-suited" for practical application because parties would have

Applying the above standards to the facts of this case, it is apparent the Respondent had no obligation to bargain over its decision to open the New Albany, Indiana truck-maintenance facility. The record here establishes that this decision was completely unrelated to "labor costs (direct and/or indirect)" and that "the union could not have offered labor costs concessions that could have changed the employer's decision." Id. In early 2011, the Respondent began preparing contingency plans in advance of the planned repair of the Kennedy Bridge, one of only two bridges over the Ohio River connecting Louisville and southern Indiana that were open to commercial traffic. It began preparing to open a maintenance shop in New Albany to service its southern Indiana trucks without their having to cross the sole remaining bridge open to commercial traffic, the Sherman Minton Bridge, which would become congested once repairs to the Kennedy Bridge commenced. On September 9, 2011, government inspectors found a structural defect in the Sherman Minton Bridge and immediately shut it down. At the time, the Union was on strike, and no unit mechanics were servicing any of the Respondent's trucks. The Respondent quickly opened its New Albany maintenance shop to service its southern Indiana trucks. There is no evidence in the record that labor costs are any different in New Albany than they are in Louisville. Assuming the opening of the New Albany maintenance shop resulted in a relocation of unit work, this change did not involve labor costs. It was simply a matter of logistics: trucks cannot cross rivers in the absence of bridges.[11] Therefore, I believe the Board must conclude that the reasons for any work relocation here had nothing to do with labor costs, which precludes any finding that bargaining was required over the Respondent's decision.[12]

2. *The Union waived any effects-bargaining rights by its failure to request bargaining*. I agree with my colleagues that the Respondent had a potential duty to engage in effects bargaining regarding any relocation of truck-maintenance work to the New Albany facility. However, as noted above, an effects-bargaining violation would not warrant the remedy ordered by my colleagues, who require the Respondent to rescind the Louisville-to-New Albany work relocation and provide backpay and reinstatement to the affected employees. The appropriate remedy for an effects-bargaining violation would include an order to engage in effects bargaining and a limited *Transmarine* backpay remedy.[13]

However, I believe there is a more fundamental issue, which relates to the Union's failure to request bargaining over any effects associated with the opening of the New Albany truck-maintenance shop. As the judge found, the Union had actual notice of the opening of that shop. Additionally, because bargaining-unit employees were on strike at the time, several months passed before the partial work relocation had any impact on unit employees. The Union did not request effects bargaining, even though it could have done so long before the change affected any

difficulty determining in advance whether decision bargaining would be required over a particular work relocation. See *First National Maintenance*, supra, 452 U.S. at 684–685. More generally, I believe the Board would be well advised to adopt a more unified standard regarding decision-bargaining obligations in cases involving major business changes that would be consistent with *Fibreboard* and *First National Maintenance* without having different tests that depend on the characterization or label attached to the decision. Compare *Torrington Industries*, 307 NLRB 809 (1992) (ostensibly addressing "*Fibreboard* subcontracting" decisions), supplemented 316 NLRB 500 (1995), with *First National Maintenance*, supra (dealing with "partial closing" decisions) and *Dubuque Packing*, supra (dealing with "relocation" decisions). Cf. *Embarq Corp.*, 356 NLRB 982, slip op. at 983–984 (2011) (Chairman Liebman, concurring) (suggesting potential changes in the "*Dubuque* framework" as it relates to union information requests regarding relocations). In the instant case, however, I believe the precise standard is immaterial for two reasons. First, the work transfer resulted from causes that undermine any potential decision-bargaining obligation under any potential test. A truck maintenance shop was opened in New Albany, Indiana because state officials had closed one of the two bridges commercial vehicles are permitted to use to cross the Ohio River between Louisville and southern Indiana and a second bridge was slated for repair, and these circumstances were obviously unrelated to wages, working conditions or other matters potentially subject to negotiation between the parties. Second, regardless of what standard is applied to determine whether the Respondent had a decision-bargaining obligation, the Union's failure to request bargaining constituted a waiver of any bargaining obligation even assuming one existed. Accordingly, I rely on *Dubuque Packing* because the Board has uniformly applied this standard in Sec. 8(a)(5) cases involving work relocations. However, I believe the Board could develop clearer standards in this important area consistent with *Fibreboard* and *First National Maintenance*.

[11] Although the Kennedy Bridge remained open when the Sherman Minton Bridge was shut down, nothing in the record undermines the Respondent's expressed concern that congestion was likely to render impractical continuing to have Indiana trucks serviced in Kentucky, and the reasonableness of this concern is reinforced by the fact that Kentucky had previously announced plans to repair the Kennedy Bridge.

[12] Both procedurally and on the merits, my colleagues reject my analysis under *Dubuque Packing* and my finding that the Respondent's relocation of truck-maintenance work from Louisville to Southern Indiana was not a mandatory subject of bargaining. Procedurally, they say my analysis is improper on the basis that the Respondent did not rely on *Dubuque Packing* or argue that the work relocation was not a mandatory subject. I believe that applicable law should be applied, regardless of whether the parties have done so—and so does the Supreme Court. See *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) (stating that "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law"). On the merits, the majority contends that the record does not establish that the decision to relocate truck-maintenance work from Louisville to New Albany was unrelated to labor costs. Again, trucks cannot cross rivers in the absence of bridges, and no amount of money can alter that reality.

[13] See *Transmarine Navigation Corp.*, supra.

unit employees. Moreover, as noted previously, the Union was engaged in bargaining with the Respondent on an array of other issues, and still it failed to request effects bargaining.[14] In these circumstances, as in *U.S. Lingerie Corp.*, supra, 170 NLRB at 752, there was no unlawful failure to bargain because "the Union had sufficient notice of Respondent's intended move to place upon it the burden of demanding bargaining if it wished to preserve its rights to bargain."[15] The Union's failure to request bargaining constituted a waiver of any effects-bargaining rights that otherwise existed under Section 8(d) and 8(a)(5).[16]

For the foregoing reasons, I believe the Respondent had no duty to bargain with the Union over the decision to open its service center in New Albany, Indiana, the Union waived its right to bargain over the effects of that decision, and the majority's remedy—rescission of any work relocation and reinstatement of affected employees with backpay—is unwarranted even if there were an effects-bargaining violation. Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT transfer any bargaining-unit work from Louisville, Kentucky, to New Albany, Indiana, without first notifying the Union and giving it an opportunity to bargain regarding the decision and its effects.

WE WILL NOT fail to reinstate striking employees to their former or substantially equivalent positions in the absence of a legitimate and substantial business justification.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful unilateral transfer of unit work to New Albany, Indiana, and WE WILL restore the status quo by restoring to our Louisville facility all work previously performed by bargaining-unit employees.

[14] It is also relevant that in bargaining for a successor agreement covering the unit employees at the Louisville facility, the Union proposed extending the territory covered by the agreement to include truck mechanics in southern Indiana. (The bargaining unit in New Albany excluded truck mechanics, and no truck mechanics had worked at the New Albany facility since 1993.) The Respondent rejected this proposal and told the Union that it wished to preserve its flexibility regarding the servicing of its southern Indiana fleet. Respondent's subsequent opening of the New Albany maintenance shop, driven by the state-ordered bridge closing and repair work, is consistent with its response to the Union's proposal, and the proposal reveals that the Union had some awareness of the potential business considerations that might disfavor continuing to have southern Indiana trucks serviced in Kentucky. Additionally, the record leaves no doubt that the subsequent opening of the New Albany truck-maintenance shop was precipitated by the sudden closing of the Sherman Minton Bridge (after Kentucky had announced plans to repair the Kennedy Bridge). For this reason, I do not believe my colleagues can base the finding of a violation on Respondent's failure to provide earlier notice to the Union of the potential opening of a shop in New Albany. See *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990) (rejecting the contention that, for purposes of effects bargaining, "an employer is obligated to provide notice to the union" whenever potential changes are "under active consideration").

[15] See also the cases cited in fn. 8, supra.

[16] Because, as explained above, the Respondent had no decision-bargaining obligation regarding the relocation of service work to the New Albany facility, and the Union's failure to request bargaining waived any effects-bargaining rights it otherwise had, I do not find it necessary to pass on any "contract waiver" arguments discussed by my colleagues or the judge (for example, pertaining to the "zipper clause" contained in the parties' collective-bargaining agreement), nor do the facts warrant differentiating between waiver principles and the "contract coverage" standard that has been applied by some courts (since no collective-bargaining agreement was in effect when the New Albany service center was opened). Cf. *Tesoro Refining & Marketing Co.*, 360 NLRB No. 46, slip op. at 3 fn. 10 (2014) (Member Miscimarra, concurring); *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993).

Finally, I disagree with my colleagues that the Respondent violated Sec. 8(a)(3) by failing to reinstate striking mechanics at its Louisville facility. Before the strike, the Respondent employed 6 mechanics at that facility. It hired 2 mechanics in New Albany at its newly opened service center, and as I have explained, the relocation of work to New Albany was lawful. In his brief in support of cross-exceptions, the General Counsel expressly concedes that the Respondent *permanently* replaced 2 striking mechanics in Louisville, and the Respondent states that 2 mechanics were all it needed due to a reduction in its fleet of trucks. Accordingly, there were no available mechanic positions in Louisville for returning strikers to fill.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All truck and garage operation employees including, all ready mix truck drivers, ready mix batch and yard laborers and ready mix truck mechanics employed by us at our facilities in Louisville, Middletown, Shelbyville and Shepherdsville, Kentucky, excluding office clerical employees, superintendents, assistant superintendents, foremen, dispatchers, watchmen, and professional employees, guards, and supervisors as defined in the Act.

WE WILL, within 14 days from the date of this Order, offer those employees who were refused reinstatement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make employees who were refused reinstatement whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee

WE WILL remove from our files any reference to our unlawful refusals to reinstate and WE WILL notify employees in writing that this has been done and that the refusals to reinstate will not be used against them in any way.

IMI SOUTH, LLC, D/B/A IRVING MATERIALS

The Board's decision can be found at www.nlrb.gov/case/09-CA-080462 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Kevin Luken, Esq., for the General Counsel.
James U. Smith, III, Kevin M. Morris, Esqs. (Smith and Smith) of Louisville, Kentucky, for the Respondent.
Robert Colone, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Louisville, Kentucky, on October 17 and 18, 2012. Teamsters Local Union No. 89 filed the charge in Case 09–CA–080462 on May 7, 2012. The General Counsel issued the complaint in this matter on August 17, 2012. The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) by unilaterally transferring the bargaining unit work of its Louisville mechanics to unrepresented mechanics working at New Albany, Indiana. The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) by failing and refusing to reinstate any of its Louisville mechanics after they had unconditionally offered to return to work after the Union's September 7, 2011, to April 29, 2012 strike against Respondent.[1]

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, IMI South, d/b/a Irving Materials, is a corporation which produces and distributes ready mix concrete from a number of facilities in a number of states, including one in Louisville, Kentucky, and another in New Albany, Indiana. Respondent annually purchases and receives goods valued in excess of $50,000 from outside of the State of Kentucky at its Louisville facility. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Teamsters Local 89 has represented employees at a number of Respondent's facilities for many years. At Respondent's Louisville facility, Local 89 has represented Respondent's employees,

[1] The complaint specifically alleges that Respondent refused to reinstate Louisville mechanics Steve Sandbach and Simon Hodge. At the hearing the General Counsel amended the complaint to allege a violation for failing and refusing to reinstate any similarly situated employee (i.e., any unit mechanic who had gone on strike—in the event that Hodge and/or Sandbach were unavailable or declined reinstatement).

[2] There are 2 exhibits designated as GC Exh. 1. One is the formal papers. The other is a list of Respondent's facilities at which Local 89 represents employees. Whenever I refer to GC Exh. 1, I am referring to the list of facilities. At Tr. 42, line 2, 64 should be 65.

including truck drivers, batch operators and truck mechanics at least since 1993. Local 89 also represents employees, including truck drivers and batch operators at several of Respondent's facilities in Southern Indiana, including New Albany. Prior to 2009, Local 89's bargaining unit at New Albany, Indiana included truck mechanics despite the fact that there had not been any truck mechanics working at that facility since about 1993. Maintenance and repair work on Respondent's trucks operating in Southern Indiana was performed by members of the Louisville bargaining unit, working out of the Louisville facility until September 7, 2011. They worked on the concrete trucks either on the road or at the Louisville shop.

During negotiations for a 2009–2012 collective-bargaining agreement in New Albany, truck mechanics were excluded from the description of the bargaining unit. Despite the fact that drivers and mechanics from Louisville worked in Southern Indiana, the 2008–2011 collective-bargaining agreement for the Louisville facility did not, on its face, cover most work in Southern Indiana. The mechanics at Louisville serviced Respondent's trucks operating out of the following locations in Southern Indiana: Corydon, Salem, Scottsburg, New Albany, Clarksville, and Greenville.

Article I of the July 1, 2008—June 30, 2011 collective-bargaining agreement covering unit employees at the Louisville facility, entitled Declaration of Intent, Section 2, Coverage, stated:

> The territory covered by this Agreement shall be the Kentucky territory defined as Louisville and Middletown, in addition to driving personnel at the Shelbyville and Shepherdsville locations. The operations covered thereby are the hauling by truck of any building materials, such as but not limited to, Ready-Mix concrete, and related building supplies, reinforcing steel, building specialties, and any other materials, customarily classed and known as building materials.

In January 2011, Kevin Swaidner became the president of IMI's South Division. Soon afterwards, Christopher Holt, the fleet maintenance director at the Louisville facility, discussed with Swaidner his concern regarding the State of Kentucky's plans to repair the Kennedy Bridge, which spans the Ohio River between Louisville and Southern Indiana. In 2011 and at the present time, there are three bridges between Louisville and Southern Indiana.[3] They are the Kennedy Bridge, which is part of Interstate 65 and takes traffic north in the direction of Indianapolis; the Sherman Minton[4] Bridge, which is part of Interstate 64, taking traffic west towards St. Louis: and the Second Street or George Rogers Clark[5] Bridge. Commercial traffic is prohibited from using the Second Street Bridge, thus leaving only one bridge available to Respondent's trucks if either the Kennedy or Minton Bridge closed. At the time Holt first discussed the repair work on the Kennedy Bridge, the State had not indicated when these repairs would take place.

In May 2011, Swaidner told Holt to prepare to open a maintenance shop in Southern Indiana. Respondent initially planned to operate this shop at the start of 2012. It did not inform the Union of its plans, nor did it ever indicate whether the operation of this shop was intended to be a temporary measure to address the expected bridge closings or a permanent measure. Respondent hired an outside contractor to start work preparing a maintenance shop at its New Albany, Indiana facility on June 8, 2011.

Collective-bargaining negotiations for a successor contract to the July 1, 2008—June 30, 2011 contract commenced on June 13, 2011. At the initial session, the Union presented Respondent a proposal consisting of a list of 12 items. Item 10 was, "Define area for the shop and Drivers."[6] The Union thus sought to extend the territory covered by the agreement, as written, to include Southern Indiana for both the drivers and mechanics (Tr. 178–179). In effect, what the Union attempted to do was to codify an established past practice. The proposal was rejected by Respondent, GC Exh. 6, 5th unnumbered page.

There is conflicting testimony as to what else was said about item 10 during the negotiation session. I credit the following testimony of Respondent's human resources director, James Janes:

> Q. [by Respondent's counsel] By Proposal Number 10 what was, what did the Union tell you that they were attempting to do?
> A. They sought to increase their territory to include territory for mechanics to include Southern Indiana, which would be the Corydon, Salem, Scottsburg and Madison locations as well as New Albany.
> Q. Did Mr. Cooper [Jeffrey Cooper, the Union's lead negotiator] identify those particular areas in Southern Indiana or did you just assume that those were the areas he was talking about?
> A. I believe Southern Indiana was how he described it, all work in Southern Indiana. . . . We understood it to be all IMI South facilities in Southern Indiana, which is Madison, Salem, Scottsburg, Corydon, New Albany.
>
> (Tr. 250—251).

After, the Union made this proposal, Respondent caucused and rejected this proposal. It was not discussed again in collective-bargaining negotiations, which continued into 2012. Respondent told the Union that it "maintained our rights to service that [Southern Indiana] in the most flexible way that we need to,"

[3] There are plans to construct other bridges nearby in the future.

[4] U.S. Senator from Indiana and Justice of the U.S. Supreme Court, 1949–1956.

[5] Revolutionary War Hero, who captured the British fort at Vincennes in 1779.

[6] There was also some discussion at hearing about item 8, "out of town pay to include all employees for any work performed outside of the contract area." Art. IX of the 2008–2011 contract covered out of town pay in Section 24, GC 2, p. 23. That provision defines contract area with reference to one location in Indiana; Clarksville (loading only). I assume the reference in that Section to Lawrenceburg is to Lawrenceburg, Kentucky, near Lexington, not Lawrenceburg, Indiana, a suburb of Cincinnati. The Union sought to obtain "out of town" pay for mechanics working in Southern Indiana, which drivers were entitled to under the 2008–2011 agreement. Respondent rejected this proposal.

The company cites this proposal for the proposition that the Union recognized that mechanics' work in Indiana was not covered by the 2008–2011 agreement. The inclusion of an identical provision in the 2012 agreement is additional support for the company's contention that the Union waived its bargaining rights over the mechanics' work in Southern Indiana.

(Tr. 117).[7]

Upon expiration of the 2008–2011 contract on June 30, 2011, the parties agreed to extend the life of the contract. The Union terminated this extension in late August 2011. On September 7, 2011, the Union went on strike against Respondent at the Louisville facility. Union employees at the New Albany facility engaged in a sympathy strike that lasted from about September 9, until mid-November.

On September 9, government inspectors found a structural defect on the Sherman Minton Bridge and shut it down immediately. This bridge was not reopened for about six months. As a result, repair work on the Kennedy Bridge, the only remaining bridge open to commercial traffic, was delayed. In response to the closing of the Sherman Minton Bridge, Respondent decided to open the maintenance shop in New Albany as soon as possible (Tr. 50).

By mid October 2012, if not earlier, two mechanics working out of the New Albany Shop were performing maintenance and repair work on Respondent's trucks in Southern Indiana. Respondent never notified the Union of this fact. The Union's lead negotiator, Jeffrey Cooper, became aware of the New Albany maintenance operation from other sources after January 1, 2011, but prior to the conclusion of collective-bargaining negotiations. Cooper contacted the Union's New Albany steward soon thereafter and asked the steward for the names of the New Albany mechanics (Tr. 134). There is no evidence that he asked the steward for any other information about the shop.

Cooper had visited the New Albany facility for grievance meetings between June and September 7, 2011, when the Respondent was refurbishing the shop, on approximately 10 occasions.[8] There is no evidence that he made any other inquiry regarding the preparations regarding the New Albany shop prior to the strike, or its operation afterwards. Respondent never advised the Union whether the opening of the New Albany Shop was a temporary measure to address the bridge closing and/or the strike, or a permanent measure.[9]

On February 16, 2012, at a joint meeting of the Union and Respondent, Respondent accepted the Union's proposed collective-bargaining agreement (Exh. R-5).[10] This agreement contained a coverage provision that was identical to the 2008–2011 provision. It also contained a "zipper clause" that was also identical to that in the 2008–2011 contract (Exh. R-5, p. 30).

ARTICLE XV EXTENT AND NATURE OF AGREEMENT

> Section 1: This Agreement expresses the complete understanding of the parties on subjects of wages, hours of employment and working conditions. During the term of this Agreement neither party hereto will make any demands upon the other with respect to any and all matters not covered herein.
>
> Section 2: This Agreement embraces in their entirety all the terms and conditions imposed on and the benefits granted to the parties and shall be strictly construed. The rights, duties, and privileges are strictly limited to the terms stated.
>
> Section 3: [omitted due to irrelevance]
>
> Section 4: By the execution of this Agreement, the parties hereto have annulled any prior Agreement or understanding, whether written, verbal or implied, which may have existed between Irving Materials, Inc. and Truck Drivers Local Union No. 89, or any member of either organization.

The Union made an unconditional offer to return to work on April 29, 2012, and informed its members to report to work on April 30. The new collective-bargaining agreement was apparently executed on May 1, 2012. Respondent did not reinstate any of the 6 mechanics who had been working at Louisville prior to the strike. It hired 2 permanent replacements in Louisville and continued to perform the maintenance and repair work for Southern Indiana out of New Albany. The mechanics in New Albany are not part of Local 89's New Albany bargaining unit.

ANALYSIS

Generally, an employer has a statutory obligation to continue to follow the terms and conditions of employment governing the employer-employee relationship in an expired contract until a new agreement is reached or good-faith bargaining leads to impasse, e.g., *R.E.C. Corp.,* 296 NLRB 1292, 1293 (1989). During negotiations, an employer's obligation encompasses a duty to refrain from implementation of a change in such terms and conditions unless or until an overall impasse has been reached, *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991). A longtime established practice becomes an implied term and condition of employment by mutual consent of the parties—even if this practice deviates from the letter of the parties' written agreement, e.g, *Riverside Cement Co.,* 296 NLRB 840, 841 (1989); *Intermountain Rural Electric Assn. v. NLRB,* 984 F. 2d 1562 (10th Cir. 1993)*; Smith Industries,* 316 NLRB 376 (1995); *The Sacramento Union,* 258 NLRB 1074–1075 (1981); also see *Lafayette Grinding Corp.,* 337 NLRB 832 (2002).

There is no question that Respondent had a longtime established practice of assigning the maintenance work in Southern Indiana to bargaining unit mechanics at its Louisville facility.

[7] I decline to credit the testimony of union witnesses Cooper and Hodge that Respondent promised that the Louisville mechanics would continue to service Southern Indiana. Respondent's witnesses denied that any such promise was made. There is no documentary corroboration for this testimony. Moreover, even if such promises were made, they would have been negated by Section 4 of the "zipper clause" of the parties' agreement of February 16, 2012. As set forth fully below, this provision annulled all prior agreements or understandings between Respondent and the Union, which were not set forth in the agreement.

[8] Cooper testified that on these visits he would not go into the facility beyond the office just inside the gate, Tr. 165.

[9] An employer is not required to bargain over "nonpermanent, stopgap, or temporary measures to deal with a strike, *Titan Tire Corp.,* 333 NLRB 1156 fn. 7 (2001); *Land Air Delivery,* 286 NLRB 1131, 1132 fn. 7 (1987).

[10] This union proposal was virtually identical to a proposal made by the Respondent on February 3, 2012. The company proposal contained a strike settlement, which was rejected by the Union and then withdrawn by Respondent. The 2012 contract was apparently ratified in late April just prior to the Union's unconditional offer to return to work.

Thus, Respondent was obligated to bargain with the Union over any change to that practice regardless of the fact that the language of the collective bargaining agreement did not reflect this practice. The limited exception provided by an economic exigency compelling prompt action is not applicable in this case, *Bottom Line Enterprises,* supra. Respondent began planning for the transfer of mechanics work to New Albany months before the emergency closure of the Sherman Minton Bridge. At that time no firm date had been set for the repairs of the Kennedy Bridge either.

Thus, when the Union proposed delineation of the geographical scope of the new contract on June 13, Respondent had the opportunity to inform the Union of its plans and to engage in bargaining over that plan, as well as other issues, in reaching a final overall agreement or impasse. If the opening of the New Albany Shop was a temporary measure to address the anticipated bridge closings, or unanticipated closing of the Sherman Minton Bridge, Respondent was obligated to so inform the Union.

Waiver of Bargaining Rights

A party can waive its statutory right to bargain over a mandatory subject of bargaining. To be effective, a waiver of statutory bargaining rights must be clear and unmistakable. Waiver can occur in any of three ways, by express provision in a collective-bargaining agreement, by the conduct of the parties, (including past practices, bargaining history and action or inaction) or by a combination of the two, *American Diamond Tool,* 306 NLRB 570 (1992).

A Union does not generally waive its bargaining rights to a change of which it has not received notice. It is uncontroverted that Respondent never notified the Union that it was planning to transfer bargaining unit work to a shop in Southern Indiana. Moreover, Respondent failed to give the Union notice of this change even after it had been effectuated. Nevertheless, when a union has actual notice of a change in conditions of employment, from a source other than the employer, it must take advantage of that notice if it is to preserve its bargaining rights. Lack of diligence by a union amounts to a waiver of its right to bargain, *Clarkwood Corp.,* 233 NLRB 1172 (1977); *Hartman Luggage Co.,* 171 NLRB 1254 (1968).

The General Counsel argues that by the time the Union knew of the existence of the New Albany shop, the change in its past practice had become a "*fait accompli."* If so, this precludes a finding that the Union waived its bargaining rights, *Pontiac Osteopathic Hospital,* 336 NLRB 1021, 1023–1024 (2001); *UAW-Daimler Chrysler National Training Center,* 341 NLRB 431, 433–434 (2004).

However, the instant case is distinguishable from most or all "*fait accompli"* situations in that when the unilateral change was implemented and when the Union found out about it, bargaining unit employees were not working, they were still on strike. The Union therefore had the opportunity to inquire in subsequent collective-bargaining sessions whether the establishment of the mechanic's shop in New Albany was intended as a permanent transfer of work, about which Respondent was obligated to bargain, or a temporary measure to continue operations during the strike, for which Respondent had no such obligation. One would think that Cooper would have at least inquired as to whether Respondent intended to move the mechanics' work back to Louisville when the strike and bridge work ended.

I conclude that under the circumstances, the transfer of mechanics' work to New Albany was not a fait accompli. The Union had an opportunity to inquire about Respondent's intentions with regard to the New Albany maintenance shop before it impacted unit employees. Had Respondent responded by admitting that the transfer was intended to be a permanent change, the Union could have demanded bargaining over this change. By failing to make any inquiry during subsequent collective bargaining sessions, agreeing to a contract that left the coverage provisions and zipper clause unchanged, I find that the Union waived its right to bargain over the transfer of mechanics' work to New Albany.

The inclusion of the zipper clause in the 2012 contract is far more consequential than the zipper clause in the 2008–2011 contract. The past practice of Louisville mechanics performing Southern Indiana work continued throughout the term of the 2008–2011 agreement. However when the Union proposed and the company accepted the zipper clause in the 2012 agreement, Louisville mechanics were no longer performing this work due to the strike and the Union knew this work was being performed by nonunit mechanics in New Albany.

In a somewhat analogous case, the Board denied a union a remedy for statutory violations outside the 6-month limits of Section 10(b). In *Moeller Brothers Body Shop,* 306 NLRB 191 (1992), the Board held that the Union failed to exercise due diligence to determine whether or not the employer was making the fringe benefit payments required by its collective-bargaining agreement.

I believe that placing a burden of inquiry on the Union in this case is justified in part by the fact that the operation of the New Albany shop was contrary to the Union's June 13 proposal. Christopher Holt's testimony at Tr. 36 indicates that the New Albany shop required considerable work to prepare it for operation. In these circumstances, I conclude that the Union waived its bargaining rights regarding the transfer of mechanics' work both by the terms of the new collective bargaining agreement and its conduct after it became aware of the existence of the Southern Indiana shop. To summarize, I do so on the basis on the following considerations:

1. The Union knew that mechanics' work was being performed in New Albany while collective bargaining negotiations were ongoing;
2. The Union knew that Respondent had rejected its attempts to codify established past practice in the new agreement at the July 13, 2011 bargaining session.
The Union proposed and the company accepted an agreement which left the geographical scope of the contract unchanged from the 2008-11 agreement.
4. The Union proposed and the company accepted an agreement containing a zipper clause which appears to negate any past practice not memorialized in the new agreement.

As Respondent points out the Board reached the same conclusion in a very similar case, *Radioear, Corp.,* 214 NLRB 362 (1974).

CONCLUSION OF LAW

Respondent did not violate Section 8(a)(5) and (1) by unilaterally transferring the work of the bargaining unit mechanics from Louisville to Southern Indiana nor Section 8(a)(3) and (1) in refusing to reinstate those bargaining unit mechanics who had not been permanently and legally replaced.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 18, 2012

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.